

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of XAVIER UNIVERSITY,

Licensee of Noncommercial
Radio Station WVXU(FM),
Cincinnati, OH

for Reconsideration of
Letter of Admonition

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990;

Released: March 30, 1990

By the Commission:

1. The Commission has under consideration: (1) a letter of admonition to Xavier University ("Xavier"), licensee of noncommercial radio station WVXU(FM), Cincinnati, OH, issued November 14, 1989, by the Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, for apparent violations of Section 73.503(d) of the Commission's Rules and Section 399B of the Communications Act of 1934, as amended; and (2) Xavier's petition for reconsideration dated December 11, 1989, requesting that the admonition be rescinded and that the station's files be cleared of any adverse action in regard to the underwriting credits at issue therein. The Mass Media Bureau has referred the petition to the Commission for action pursuant to Section 1.104 of the Commission's Rules.

2. The letter of admonition (LOA) was issued as a result of an August 23, 1989, complaint alleging that WVXU(FM) had been airing advertisements or promotional material inappropriate for broadcast on a noncommercial station. As examples, the complainant submitted audio tapes containing the six specific announcements cited in the LOA and demonstrating that WVXU(FM) had broadcast them during its "Morning Edition" program between 7:00 a.m. and 9:00 a.m. on various days in August 1989.

3. The LOA determined that the following material from six of WVXU(FM)'s announcements was inconsistent with the requirements of Section 73.503(d)¹ of the Commission's Rules and Section 399B of the Communications Act.²

-- "This WVXU traffic watch update is brought to you by Jiffy Lube now offering a discount on air conditioner recharge with a Penzoil oil change and 14-point lube check."

-- "Morning Edition is brought to you in part by Ametury (sic) and Associates offering creative services for advertising, marketing and training."

-- "The Choice is Yours is pleased to sponsor programming on WVXU. A health food store and restaurant, The Choice is Yours is located at 821 Delta, on Mount Lookout Square . . . Fresh and original foods are the specialty."

-- "Programming on WVXU is made possible in part by the new Meritan Gallery . . . featuring art expressing timeless traditional truths in contemporary visual vocabulary."

-- "Morning Edition is made possible in part by a grant from Arthur Anderson and Company and Anderson Consulting, serving accounting and audit, tax and management information consulting needs for over 75 years."

-- "Morning Edition is made possible in part by Strauss and Troy, a Cincinnati based law firm in its 36th year."

The LOA found that the word "discount" was comparative and provided price information, that the words "creative," "fresh and original," and those describing the Meritan Gallery's art, were qualitative and promotional in the context of the foregoing announcements, and that specifying a company's number of years in business was qualitative and impliedly comparative.

4. Xavier argues that any sanctions are unwarranted in the above cases. It explains that, shortly after the subject Jiffy Lube announcement was aired (in August), it determined that the language in the announcement (created by "the Traffic Watch") exceeded station underwriting policies and it discontinued such broadcast. Moreover, Xavier instituted a policy requiring that Traffic Watch provide advance FAX notification of any tag lines for review by station personnel, and in September 1989 a four-member underwriting screening committee began to review the FAX submissions on a daily basis. Because of the isolated nature of the infraction as well as the prompt and effective corrective action, all of which occurred well before the initiation of any Commission action, the licensee asks that the admonition be rescinded with respect to this violation.

5. Further, Xavier explains its reasoning in concluding that the phrasing in the other five announcements was within the bounds of our rules and policies governing underwriting credits on noncommercial broadcast stations. For example, regarding the description of Amateuli & Associates' product or service listing, Xavier states that Amateuli offers "creative services for advertising, marketing, and training" in the sense of "creating original material for their clients," "creative material" being the stock in trade of all ad agencies. Mention of the health food store/restaurant's "fresh and original foods," the licensee argues, is a statement identifying a product offered by the underwriter, comparable to "French food, or homemade food, or fast food," and describes the underwriter's practice of bringing in foods "right from the farm" and creating "its own totally original menu entrees." Reference to the longevity of business underwriters, the licensee maintains, describes what the firms have to offer in the way of experience and is not necessarily qualitative, a belief further bolstered by informal opinions it claims to have received from Commission personnel. Xavier urges that its reasonable, good faith judgments in these situations,

rather than fine semantic distinctions, should be given more weight and that the admonition should be rescinded.

6. As the Commission stated in *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 90 FCC 2d 895 (1982), "We recognize that it may be difficult to distinguish at times between announcements that promote and those that identify. We only expect our public broadcast licensees to exercise their reasonable, good faith judgments in this regard."³ We are persuaded that the language at issue in the latter five announcements listed at Paragraph 3, above, is not clearly promotional as opposed to identifying and that the licensee exercised reasonable, good faith judgment regarding the language in the five disputed announcements describing its underwriters' product lines and services. Accordingly, we find that the broadcast of these announcements is not a violation of Section 73.503(d) of the Commission's Rules or Section 399B of the Communications Act, and that no sanction should have been issued.

7. With respect to the other announcement, which mentioned a discount being offered by Jiffy Lube, the underwriter, we find that under the totality of circumstances WVXU should not be admonished. In this case, the licensee immediately took action to correct this isolated lapse well before the Commission issued the LOA. Such action included deleting the questionable announcement and instituting review procedures to prevent airing similar announcements in the future. Moreover, although the announcement appears to cross the line established by our rules, it certainly is not as egregious as the promotional announcements that triggered previous enforcement actions. See e.g., *Public Notice*, "In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," FCC 86-161 at 5 n.3, April 11, 1986.

8. In light of the foregoing, we believe it appropriate to rescind the November 14, 1989, letter of admonition. Accordingly, the subject petition for reconsideration filed by Xavier University on December 11, 1989, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Each [noncommercial educational FM broadcast] station shall furnish a nonprofit and noncommercial broadcast service. . . . No promotional announcement on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. . . .

47 C.F.R. § 73.503(d).

² (a) For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended . . . to promote any service, facility, or product offered by any person who is engaged in such offering for profit; . . .

(b)(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

47 U.S.C. § 399B.

³ 90 FCC 2d at 911. See also *Public Notice*, "In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," FCC 86-161, April 11, 1986.